Date: February 1, 1999
Case No.: 1998-LHC-2054/1998-LHC-2055
OWCP No.: 1-107231/1-142065

In the Matter of:
WILLIAM FURR,
Claimant

v.

GENERAL DYNAMICS CORPORATION,
Employer
and
NATIONAL EMPLOYERS COMPANY,
Carrier

and

DIRECTOR, OFFICE OF WORKERS'S
COMPENSATION PROGRAMS,
Party in Interest

Appearances:
Gerald Rucci, Esq.
Groton, CT
For the Claimant

Peter Quay, Esq.
New London, CT
For the Employer/Carrier

Merle D. Hyman, Esq.
Office of the Solicitor
Boston, MA
For the Party-in-Interest[1]

Before: **THOMAS F. PHALEN, JR.**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS AND APPROVAL OF ATTORNEY FEES

[1] By letter of September 30, 1998, the Office of the District Director, through the office of the Regional Solicitor, has indicated that it does not wish to participate in the present proceeding, and accordingly did not appear at the hearing.

This is a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act as amended (33 U.S.C. §901, **et seq**.), herein referred to as the "Act." The hearing was held on October 13, 1997, in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were requested herein, and submitted by the Claimant and the Employer. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and EX/RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On March 3, 1989, Claimant suffered an injury in the course and scope of his employment.

4. All notice, claim, and controversion requirements were the subject of timely compliance, namely: (1) that Claimant gave the Employer notice of the injuries in a timely manner; (2) that Claimant filed a timely claim for compensation; and (3) that the Employer filed a timely notice of controversion.

5. The parties attended an informal conference on February 18, 1989.

6. The applicable average weekly wage is $489.58.

7. Claimant's post injury work activities demonstrate that his earning work capacity retroactive to the date of injury would be $200.00 a week, creating a loss of wage earning capacity of $289.58 a week which results in a compensation rate of $193.05 a week under Section 8(c)(21).

8. The Employer voluntarily and without an award has paid temporary total compensation from March 4, 1989 through April 18, 1991, and then permanent partial disability benefit payments from April 21, 1991 through the present. (TR 14-15)

The unresolved issues in this proceeding are:

1. The nature and extent of Claimant's injury. (Ct. Post Hrg. Memo P. 2)

2. The date of maximum medical improvement. (Ct. Post Hrg. Memo P. 2)

3. The application of Section 8(f) of the Act. (TR 16)[2]

For the reasons stated herein, the Court finds that the Employer had timely notice of the Claimant's injury, and that he filed timely claims for compensation. This court further finds that he suffers from chronic back condition arising out of and suffered in, the course of his employment, and that the Employer is not only responsible for the benefits awarded herein, but is also entitled to Section 8(f) relief in mitigation of that obligation.

Summary of the Evidence

The Claimant, William Furr, was born on July 29, 1947. (TR 18) He is now age 51.

The Claimant started working at the Groton Connecticut shipyard of the Electric Boat Corporation, now General Dynamics Corporation, Electric Boat Division, ("Employer," herein) in the late '70's, or early '80's as a painter/cleaner, where he has worked until March 3, 1989 when he was injured. (TR 23). The Employer is a maritime facility adjacent to the navigable waters of the Thames River, where the Employer builds, repairs, and overhauls submarines. The Claimant was employed in a restaurant, Country Bob's, in upstate New York, as a baker until 1997. He is no longer able. (TR 24) He has not worked for the Employer since March, 1989, (TR 27) but has worked at quite a few jobs since 1991, (TR 29) all of which have been divulged to the employer and subject to the appropriate set-offs in calculating amounts due to the claimant. (TR 30)

The present claim resulted from a light duty assignment in the paint shop when he was picking up buckets of paint to dump them into a barrel and hit up against something and twisted his back. (TR 22) At that time his duties were restricted to lifting "so many

[2] The Claimant takes no position on this issue, (Ct. Post Hrg. Memo P. 6) and the Party In Interest, the Office of the District Director, did not appear to defend its controversion on the Employer's application for Section 8(f) relief. In the undersigned's review of the record, it was discovered that the employer's request for Section 8(f) relief together with its attachments was not included with the employee's pre-hearing statement as part of the entire ALJ EX 3. (TR 6) ALJ EX 3 should have consisted of the District Director's referral letter of May 14, 1998 together with all of its attachments, including the employee's LS 18 pre-hearing statement, which was inadvertently the only document so identified in the record as ALJ EX 3, and the request for Section 8(f) relief, and its attachments thereto. Therefore, it is ordered that the District Director's referral letter of May 14, 1998, together with all of its attachments, including the Employer's request for Section 8(f) relief, together with its attachments, and the employees LS-18, pre-hearing statement, be, and it hereby is, accepted into evidence as ALJ EX 3.

pounds," and he could not squat or bend, or work in confined areas or climb ladders, with other restrictions. (TR 22) He saw Dr. Pierce Browning, who "took me out of work," (TR 23) and he never returned to work at EBC. The Claimant had several other injuries including one on June 27, 1984 when he fell against a missile tube and injured his back, resulting in a hemilaminectomy and foraminotomy, and again on March 29, 1988 when he also hurt his back, striking it on a hangar. (See RX's 1-5)

The treating physician notes of Dr. Browning reveal a course of evaluation and treatment for these various injuries, from 1984 to the present in which he has directed increasingly severe work restrictions, until the Claimant is no longer able to engage in his prior work as a painter/cleaner for the Employer. According to the review of Dr. Willetts, Dr. Browning's letter of June 15, 1994 assigns an additional 7½% to the Claimant's disability rating, based upon Claimant's increasing restrictions in that letter. This has been adopted by the Employer in its application for Section 8(f) relief when it adopts the June 15, 1994 date of that letter as the proposed date of the Claimant's maximum medical improvement. (ALJ EX 3@ p.2)[3] In his deposition of November 3, 1998, Dr. Browning affirms this permanency rating of a total of 22½%, with 15% attributable to the 1984 injury, and 7½% due to the injury of March 3, 1989, (Dr. Browning Depo. @ p. 12) referring to his letters of July 17, 1989 and June 15, 1994. Independent medical examiner, Dr. Willetts, sets forth 25 lb. lifting restriction and a 12% permanent partial disability, (CX 2; RX 18) in which he also notes a 40-45% service connected disability for loss of a part of his left hand, but attributes only 1% additional to the March 3, 1989 injury. (CX 2 @ p. 9)

Dr. Cambridge describes a severe service connected injury to the Claimant's left hand while disarming a bomb, in which he lost the ulnar half of his left hand. (RX 17-2) Among other restrictions, he limits lifting to 15 - 20 lbs. He also notes a post 1988 injury, completion of college with a degree in drafting, but with an inability to work in that position due to his inability to sit for prolonged periods of time. He finds, as do the others, that the present injury aggravates the prior injury, and places his impairment at 15% permanent partial disability, without differentiating the rating to be attributed to the prior injury. (Ibid.)

Aside from the Claimant's statement that the maximum medical improvement date has been April 9, 1991, from which it contends that, "the Claimant's position has not changed," (Ct. Post Hrg.

[3] By failing to participate in the present proceeding, or to even file a position statement related to the date of maximum medical improvement, the District Director is deemed to have acquiesced in the position of the Employer in its proposed date of maximum medical improvement.

Memo. @ p. 5) without citation to medical records, the only clear reference to a time of Claimant's maximum medical improvement, appears in the above Employer's application for Section 8(f) relief. There, the Employer relies on the attached January 12, 1998 letter of Dr. Willetts, and proposes the maximum medical improvement date to be June 15, 1994.(CX 2 @ p. 7 & RX 18 @ p. 7) In that January 12, 1998 letter, Dr. Willetts recounts the Claimant's new restrictions from Dr. Browning in which he indicates that in the June 15, 1994 letter the new injury has added 7½% to the 15% disability rating previously assigned to the Claimant, for a total of 22½%. (Ibid.)

On the basis of the totality of this record and having observed the demeanor and having heard the testimony of a credible Claimant/witnesses, I make the following:

Findings of Fact and Conclusions of Law

Nature and Extent of Injury:

In arriving at a decision in this matter, the Administrative Law Judge, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), reh. denied, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978). At the outset it further must be recognized that all factual doubts must be resolved in favor of the claimant. **Wheatley v. Adler**, 407 F.2d 307 (D.C. Cir. 1968); **Strachan Shipping Co. v. Shea**, 406 F.2d 521 (5th Cir. 1969), **cert. denied**, 395 U.S. 921 (1970). Furthermore, it has been held consistently that the Act must be construed liberally in favor of the claimant. **Voris v. Eikel**, 346 U.S. 328 (1953); **J.V. Vozzolo, Inc. v. Britton**, 377 F.2d 144 (D.C. Cir. 1967). Based upon the humanitarian nature of the Act, claimants are to be accorded the benefit of all doubts. **Durrah v. WMATA**, 760 F.2d 320 (D.C. Cir. 1985); **Champion v. S & M Traylor Brothers**, 690 F.2d 285 (D.C. Cir. 1982); **Harrison v. Potomac Electric Power Company**, 8 BRBS 313 (1978).

The Act provides a presumption that a claim comes within the provisions of the Act. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect

of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), aff'd, 620 F.2d 71 (5th Cir. 1980); **Anderson v. Todd Shipyards**, supra, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "prima facie" case. The Supreme Court has held that a "prima facie" claim for compensation, to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/ Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), rev'g **Riley v. U.S. Industries/ Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, i.e., harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a prima facie claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, supra; **Kiel v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this prima facie case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the

record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue, resolving all doubts in claimant's favor. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

In the present case, Claimant alleges that the harm to his bodily frame, i.e., the effects of back injury, resulted from twisting his back while dumping paint into barrels on the job at his Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment, and has in fact stipulated to the injury. In this regard, see **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989). Thus, Claimant has established a prima facie claim that such harm is a work-related injury, as shall now be discussed.

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. See 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), rev'g **Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), aff'd sub nom. **Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Janusziewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549

(1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In this case, both the 1989 and the prior injuries were work related, and are fully compensable under the provisions of this act.

Section 8(f) of the Act:

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 118523 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. See, **Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area**

Transit Authority, 22 BRBS 280 (1989), rev'd and remanded on other grounds sub nom. **Director v. Berstresser, 921 F.2d 306 (D.C. Cir. 1990)**; **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), aff'd, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, supra. Such information was readily available, and, indeed, was presented in the present matter without objection. (See, RX 7-8 & 11-17)

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2D 602 (3d Cir. 1976). For instance, an x-ray showing pleural thickening, followed by continued exposure to the injurious stimuli, establishes a pre-existing permanent partial disability. **Topping v. Newport News Shipbuilding**, 16 BRBS 40 (1983); **Musgrove v. William E. Campbell Co.**, 14 BRBS 762 (1982).

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects: (1) that Claimant has worked for the Employer since the early 1980's; (2) that he had a severe back injury in 1984 during the course of his employment that resulted in a hemilamenectomy and ultimately work restrictions, but not in permanent total disability; (3) that he had a second injury on March 3, 1989 that resulted in further injury to his back but was not, in and of itself, permanently and totally disabling, but from which he suffered further restrictions, and finally, (4) that he ceased work due to those injuries, in combination with each other. The three examining physicians agree on the fact of the contributory elements of the two injuries, although they differ in their disability ratings. Dr. Browning rates the disability as 15% from the 1984 injury and 7 1/2% from the second, while Dr. Willetts places it as 15% for both. Dr. Cambridge gives a 12 - 15% rating.

It is my conclusion that Dr. Browning, as the treating physician, is in the best position to evaluate the Claimant's disability, and, makes the most telling case for his final conclusion. He recites the Claimant's restrictions in detail, and identifies the kind of crawling and new weight restrictions at 25 lbs that prevent the Claimant's performance of his past duties as a painter/cleaner. I therefore find that the Claimant has a 22 1/2% permanent partial disability rating as of the date of that report, and that he is entitled to permanent partial disability benefits under the Act from that June 15, 1994 date.

The Board has consistently held that, except in hearing loss cases, Section 8(f) only applies to schedule injuries exceeding 104 weeks. **Byrd v. Toledo Overseas Terminal**, 18 BRBS 144, 147 (1986); **Strachan Shipping Co. v. Nash**, 15 BRBS 386, 391 (1983), aff'd in relevant part, 760 F.2d 569 (5th Cir. 1985), and on reconsideration en banc, 782 F.2d 513 (5th Cir. 1986).

Section 8(f) relief is not available to the employer simply because it is the responsible employer or carrier under the last employer rule promulgated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), cert. denied sub nom. **Ira S. Bushey Co. v. Cardillo**, 350 U.S. 913 (1955). The three-fold requirements of Section 8(f) must still be met. **Stokes v. Jacksonville Shipyards, Inc.**, 18 BRBS 237, 239 (1986), aff'd sub nom. **Jacksonville Shipyards, Inc. v. Director**, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

The last sentence of Section 8(f) of the Act clearly applies to the present matter. It states:

> In all other cases in which the employee has a permanent partial disability, found <u>not</u> to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide in addition to the compensation under paragraphs (b) and (e) of this section, compensation for 104 weeks only. (Emphasis added.)

In this case, the disability resulting from 1984 the injury, is now, "materially and substantially greater than that which would have resulted from the March 3, 1989 injury alone. The second, was of a lesser degree or effect than the first, and insufficient, by itself, to cause relinquishment of his job as a painter/cleaner. He was able to work as a painter with the 15% impairment resulting from the first. It must, also be assumed, therefore, that he would not have been "disabled" from performing that same painter/cleaner job if the 7 1/2% back disability had resulted solely from the March 3, 1989 back injury, in the absence of the first.

Since all named physicians concluded that the Claimant's current permanent partial disability was at least in part the result of a prior injury, it is my conclusion that there is a proper allocation of cause as stated by Dr. Browning, and that the Employer is responsible for 104 weeks of payments.

In light of the fact that the Claimant never returned to work at the Employer's shipyard after the March 3, 1989 injury; that all of the assignments of disability ratings are phrased in terms of the permanent effects of that injury, and that there is absence of any other contrary statement by any of the physicians, I find that the June 15, 1994 date set forth in the Employer's application for Section 8(f) relief constitutes the date of Claimant's maximum medical improvement, and that his entitlement to permanent partial disability benefits should run for 104 weeks from that date.

The documents demonstrate that the Employer paid the Claimant 104 weeks of temporary and partial disability benefits in the amount of $193.05 per week beginning on March 4, 1989 and continuing through April 18, 1991 in temporary partial disability benefits, and the same amount thereafter in permanent partial disability benefit payments through the present time. Therefore, the Employer is entitled to Section 8(f) relief after 104 weeks of permanent partial disability benefit payments. The Special Fund is responsible for benefits due thereafter.

Medical Benefits:

Under the provisions of 33 U.S.C. § 907(a), the Act obligates the payment of medical expenses for such period as the nature of the injury or the process of recovery may require. See, e.g., **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). Claimant is entitled to the reimbursement of medical benefits reasonably and necessarily incurred as a result of his work related injury in this case.

The Responsible Employer:

General Dynamics Corporation was the employer with whom he had his most recent period of cumulative shipyard employment, and, therefore the properly designated responsible employer, herein.

Attorneys Fee:

The Claimant's attorney has filed an itemized application for attorneys fees and costs together with his post hearing memorandum of law. The application includes $2,275.75 in "OALJ Fee" and $33.92 in "OALJ Expense." Absent objection for the Employer, the Claimant is entitled to these fees and costs.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director. Therefore,

It is therefore ORDERED that:

1. Commencing on March 4, 1989, the Employer shall pay to the Claimant compensation benefits for his temporary total disability through the Claimant's date of maximum medical improvement on June 15, 1994, and than permanent partial disability, thereafter, for a period of 104 weeks, based upon the difference between his average weekly wage at the time of the injury, $489.58, and his wage-earning capacity after the injury, $200.00 a week, resulting in a loss of earning capacity of $289.58 a week and a compensation rate under Sections 8(c)(21) and 8(h) of the Act of $193.05 per week, plus the applicable annual adjustments provided in Section 10 of the Act.

2. After the cessation of payments by the Employer, continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

3. Since the Employer has voluntarily and without an award paid temporary total compensation from March 4, 1989 through April 18, 1991, and then permanent partial disability benefit payments from April 21, 1991 through the present, the Employer shall receive credit for all amounts of temporary and permanent partial disability compensation previously paid to the Claimant as a result of his March 3, 1989 injury. The Employer shall also receive a refund, with appropriate interest, of all overpayments of compensation made to Claimant herein, if any.

4. The Employer shall reimburse such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, subject to the provisions of Section 7 of the Act.

5. The Employer pay the Claimant's attorneys fees and costs as set forth in his application.

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THOMAS F. PHALEN, JR.
Administrative Law Judge